## KATAR SINGH v. MANUEL & ANOR.

[A. C. J. (Thomson J.) August 11, 1955]
[Ipoh — Civil Appeal No. 9 of 1954]

*Subordinate Courts Rules, 1950, O. 10 — No defence filed — No objection raised at trial — Whether objection can be taken on appeal.*

In this case the plaintiff had filed a statement of claim but the defendants did not file their defences. They were however allowed to proceed and make their defences. The principal ground of appeal was that the defendants had not complied with the provisions of Order 10 of the Subordinate Courts Rules relating to the filing of defences.

Held: as the point was not taken at the trial, the appellant cannot raise it at the appeal.

*Cases referred to:—*

(1) *Davies v. Galmoye* (1888) 39 Ch. D. 322.
(2) *Dyott v. Neville* (1887) W.N. 35.

CIVIL APPEAL.

*N. Sharma* for the appellant.
Respondents not represented.

**Thomson J.** (delivering oral judgment) : — The principal ground of appeal in this case is lack of compliance with the provisions of Order 10 of the Subordinate Courts Rules relating to the filing of defences. The plaintiff filed a Statement of Claim and the defendants filed no Defences but at the trial they were allowed to proceed and make their defences.

It is said that this vitiated the proceedings because in the first place non-compliance in itself was in itself sufficient for that purpose and because in the second place the plaintiff was taken by surprise by certain matters raised in evidence by the defendants and that therefore there was a miscarriage of justice.

It would appear from the record that this point was not taken at the trial. I am in very grave doubts as to whether it is even open to the appellant to raise it at this stage. I read from the 1955 *Annual Practice* at page 1251 :—

"An objection to procedure not taken in the Court below was not allowed to be taken in the Court of Appeal"

and the authorities for that are said to be the cases of *Davies v. Galmoye*[1] and *Dyott v. Neville*[2].

In any event, even if it is open to the appellant to take the point now, I think it must fail for two reasons.

In the first place I am of the opinion his failure to take it at the trial amounted to waiver and in the second place I see no reason to suppose that even if he was taken by surprise by the two points to which he refers in the defendants' evidence he was in any way prejudiced. One of these points was in his favour and was an admission against the defendants. The other was a piece of irrelevant abuse of the type that is unfortunately only too common. It had nothing whatever to do with the case.

The whole question resolved itself into a series of questions of credibility. The Magistrate has dealt with the evidence in his Grounds of Judgment very fully and very carefully. I see no reason for interfering with his judgment in any way.

The appeal is dismissed.

Costs to the First Respondent.

There will be no costs to the Second Respondent because he has not been served.

*Appeal dismissed.*

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## LOKE YEW MINES LTD. v. EU KENG CHEE & ORS.

[O. C. J. (Wilson J.) August 15, 1955]
[K. L. — Mines Civil Suit No. 3 of 1955]

*Mining Enactment (Cap. 147), ss. 16(iii) and 97 — Application for cancellation of mining sub-lease.*

Under s. 97 of the Mining Enactment if it is proved that the sub-lessee has failed to observe the conditions referred to in paras. (a), (b), (c) and (d) of sub-s. (ii) of the same section, the lessors are entitled to an order of cancellation unless the sub-lessees can show that there are reasons why the Senior Inspector of Mines or the Court should exercise discretion in favour of the sub-lessee.

MINES CIVIL SUIT.

*C. Mills* for the complainant.
*D. G. Rawson* for the respondents.

**Wilson J.** : — The complainant company is the registered owner of the land held under Mining Lease No. 4181, Portion 1011, in the Mukim of Ampang. The respondents are the executors and trustees of the will and estate of Eu Tong Sen, deceased, and are sued as such. The land was sub-leased to Eu Tong Sen on the 20th November, 1937. Eu Tong Sen died in Hongkong some years ago. The company claims that the respondents have committed breaches of clause 4 of the sub-lease, in that since the 28th May, 1954 they have failed to work the land in accordance with clause 4 of the said sub-lease, and of clause 8(iii) of the sub-lease in that they have not during the six months prior to the date of the complaint employed at least 28 labourers or labour-saving apparatus equivalent thereto as prescribed in section 16(iii) (b) of the Mining Enactment, 1928, for not less than one month in mining the land. For these reasons they ask that the sub-lease may be cancelled.

The complaint was originally filed in the Court of the Senior Inspector of Mines, Kuala Lumpur, but was transferred for trial to this Court.

I have no doubt that at the time the complaint was filed the respondent had committed breaches of the sub-lease as alleged. However, under section 97 (ii) of the Mining Enactment the Warden or Court, as the case may be, has a discretion as to whether the sub-lease shall be cancelled or not. My reading of section 97 of the Mining Enactment is that if it has been proved that the sub-lessee has failed to observe the conditions referred to in paragraphs (a), (b), (c) and (d) of sub-section (ii) of section 97, the lessors are entitled to an order of cancellation unless the sub-lessees can show that there are reasons why the Senior Inspector of Mines or the Court should exercise discretion in favour of the sub-lessee.

In March, 1954, the respondents employed one excavator to build a bund on the land for approximately 12 days, and intermittently from June, 1954 to November, 1954. I accept the evidence of Mr. Percival Ewan Waugh that putting one excavator on the land is not implementing a mining scheme. The excavator was re-employed from April, 1955 up to the time of the trial. This, again, cannot be considered as implementing a mining scheme. In June, 1955, after the complaint was filed, the respondents employed on the land one bulldozer and a conveyor belt. According to Mr. Hazlitt, who gave evidence for the respondents, the mining scheme had been in operation since the beginning of April, 1954, and the labour requirements of the land have been fully met. This implies that the mining scheme was not in operation before April, 1954, and that prior to that date the labour requirements were not fully met.

I quite appreciate that there may be reasons why since the 28th May, 1954, there may have been difficulties which delayed the respondents in commencing mining operations. For these reasons, and in order to discover whether the respondents have done everything they could in order to start mining operations I think it is necessary to consider the whole history of the case.

The sub-lease was originally granted in 1937, and in accordance with the evidence of Mr. Hazlitt the first real step to mine was in March, 1954. It is obvious that nothing was done prior to the Japanese occupation. What could or could not have been done during the Japanese occupation I do not know, and I disregard that period from my considerations. I also disregard the period from 1946 until the end of the moratorium because, although it is possible the respondents could have obtained leave from the Mines Department to mine for that period, it has not been proved to my satisfaction that this was necessarily so. It is, however, clear that the respondents made no effort to mine from the end of 1949 until 1954.

Apparently, at some time during this period the complainants made a prior application for cancellation of the lease, but the record of that trial is not traceable and I do not know what happened except that I have been informed that the claim was withdrawn. I do not consider that this precludes me from taking into consideration the dilatory conduct of Eu Tong Sen and the respondents in considering whether the discretion of the Court should be exercised under section 97 of the Mining Enactment.

I have come to the conclusion that this complaint must succeed. I therefore give judgment for the complainant with costs and order that the mining sub-lease 4181 be cancelled.

*Judgment for the Complainant.*

Solicitors: *Bannon & Bailey; Shearn, Delamore & Co.*

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## Re THIALMUTHU DECD.; RAJARATNAM v. SUBRAMANIAM

[O. C. J. (Buhagiar J.) July 30, 1955]

[K. L. — Probate No. 1 of 1955]

*Will — Undue influence — Onus of proof.*

Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.

*Cases referred to:—*

(1) *William Low v. James Guthrie* (1909) A.C. 278.

(2) *Craig v. Lamoureux* (1920) A.C. 349.

PROBATE.

*K. J. E. T. Marsh* for the plaintiff.

*M. Edgar* for the defendant.

**Buhagiar J.**: — The plaintiff claims to be Executor of the last will dated the 9th day of February, 1952, of Thialmuthu also known as Thaial Muthu daughter of Arunasalam late of No. 9A, Bukit Bintang Road, Kuala Lumpur, deceased who died on the 6th day of April, 1952 and to have the said will established.

The defendant lodged a caveat in the High Court, Kuala Lumpur, against a Grant of Probate being made to the plaintiff.

In the statement of defence the defendant contended that:—